IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

COMPANY PETITION NO.395 OF 2006

In the matter of the Scheme of Compromise / Arrangement between IMP Powers Ltd. and its secured creditors.

IMP Powers Limited, a Company incorporated under the Companies Act, 1956 having its registered office at Advent, 7th Floor, 12-A General J.Bhosale Marg, Nariman Point, Mumbai-400 021. ..Petitioner.

Mr.Chirag Balsara i/b.Prashant Pandit for Petitioner.

Ms.Vandana Jaisingh for respondent.

Mr.N.D.Sharma with Bharti Mahant for R.D.

CORAM : DR.D.Y.CHANDRACHUD, J.

DATED : 29TH MARCH, 2007.

ORAL JUDGMENT

In this proceeding, the consent of the Court is sought to a scheme of an arrangement in exercise of powers conferred by section 391 to 394 of the Companies Act, 1956.

2. As on 30th September, 2005, 47.2% of the issued and subscribed share capital of the petitioner was held by Promoters, 21.20% by Financial Institutions and 31.60% by members of the public. As on 30th June, 2005, according to the petitioners, there was an

outstanding of nearly Rs.68 crores due to secured creditors. The petitioners proposed a scheme of compromise and arrangement with the secured creditors. On 23rd December, 2004 the Corporate Debt Restructuring Cell granted its approval to the proposal made by the petitioners and appointed a Monitoring committee in order to sort out the outstanding issues and for monitoring the implementation of the reconstruction package.

3. In pursuance of the orders passed by this Court, a meeting was convened of the secured creditors on 20th May, 2006. The report of the Scrutineer sets out that out of the eight secured creditors who attended the meeting, seven who had a total outstanding of Rs.6204.62 lakhs voted in favour of the scheme of compromise / arrangement. IndusInd Bank Ltd. which is also a secured creditor voted against the scheme. According to the petitioners, the outstandings, due and payable to IndusInd Bank were Rs.409.53 lacks. This has been contested by the Bank and according to the Bank, the correct amount due as on 30th June, 2005 stood at Rs.625.63 lakhs. IndusInd Bank Ltd. has instituted proceedings before the Debt Recovery Tribunal under the provisions of the Recovery of Debts Due to Banks and Financial Institutions Act, 1993 for

the recovery of its dues. The proceeding initiated by the Bank (O.A. No.253/05) is pending before the Debt Recovery Tribunal, Mumbai.

4. The principal objection which has been urged on behalf of IndusInd Bank Ltd. is that in view of the Judgment of the Supreme Court in **Allahabad Bank V/s. Canara Bank & Anr. (JT 2000(4) S.C. 411**) the exclusive jurisdiction on question of adjudication, execution and working out the priorities vests with the Debt Recovery Tribunal constituted under the plenary provisions of the enactment of 1993. The Supreme Court, it is urged, held that whereas the Companies Act is a general statute, the RDB Act is a special statute which would overrule the former. Alternatively, even if both the statutes were regarded as special enactments, the RDB Act being a later enactment of 1993 would govern. It is submitted that while sanctioning a scheme of compromise / arrangement under section 394 of the Companies Act, 1956, this Court would have no jurisdiction to adjudicate upon the claim of IndusInd Bank Ltd. or to foreclose an adjudication on the application for recovery instituted in the Debt Recovery Tribunal. But, it has been submitted that the effect of the scheme involves precisely such a consequence, since the scheme contemplates certain

concessions to be granted by lending institutions, including a reduction in the rate of interest to be charged. Moreover, it is submitted that the scheme contemplates the restoration of working capital facilities, a consequence that would be imposed even on a financial institution which is not prepared to be a part of a restructuring package propounded by the CDR Cell. At this stage, it would be material to note that the objector before this Court is a Company by name of Pegasus Assets Reconstruction Pvt. Ltd. which claims under an agreement of assignment entered into between the IndusInd Bank Ltd. and the objector on 30th August, 2006.

5. On the other hand, it has been urged on behalf of the petitioners that section 391 of the Companies Act, 1956 makes no distinction between a creditor who is a financial institution or otherwise. The submission was that in exercise of the power conferred by section 394, the Court can affect the rights of all creditors and in that process modify existing contracts. Consequently, it has been urged that if an existing contract is modified by the Court in exercise of the power conferred by section 394 all creditors and the Debt Recovery Tribunal as a judicial forum constituted under the RDB Act will be bound.

Once sanctioned, it is submitted that the scheme has the force of law and the scheme as it stands will have to be enforced by the Debt Recovery Tribunal.

6. The objection to the sanction of the scheme in so far as it comprehends the debt due to industrial Bank will have to be upheld in view of the Judgment of the Supreme Court in Allahabad Bank (supra). The Recovery of Debts Due to Banks and Financial Institutions Act, 1993 was enacted in pursuance of the report of the Narsimham Committee in order to provide expeditious adjudication and recovery of debts due to banks and financial institutions. Sub-section (1) of section 17 provides that the Tribunal shall exercise, on and from the appointed date, the jurisdiction, powers and authority to entertain and decide applications from banks and financial institutions for recovery of debts due to them. Section 18 bars the jurisdiction, power or authority (except of the Supreme Court and a High Court exercising jurisdiction under Articles 226 & 227 of the Constitution) relating to matters specified in section 17. Section 34 confers overriding effect upon the provisions of the Act, notwithstanding anything inconsistent contained in any other law for the time being in force. In the decision in Allahabad Bank, the Supreme Court held that the

jurisdiction of the Tribunal in matters of adjudication is exclusive. One of the points which arose for consideration was whether the Act would override the provisions of Sections 442, 446 and 537 of the Companies Act, 1956. The Supreme Court held that a "superior purpose" underlies the RDB Act, something more important than the object which underlies Sections 442, 446 and 537 of the Companies Act, 1956. The intention of the Parliament was, it is emphasised, "that there should be speedy and summary remedy for recovery of thousand of crores which were due to the Banks and to Financial Institutions, so that the delays occurring in winding up could be avoided." The Supreme Court held that the exclusiveness of jurisdiction covered matters of adjudication as well as issues relating to the execution of orders and section 19(19) of the RDB Act empowers the Debt Recovery Tribunal to order distribution of sale proceeds amongst secured creditors in accordance with the provisions of section 529A of the Companies Act, 1956. The Supreme Court held thus:-

> " Thus, on questions of adjudication, execution and working out priorities, the special provisions made in the RDB Act have to be applied. "

The Supreme Court upheld the view taken by several High Courts that the Companies Act, 1956 must be treated as

a general statute and the RDB Act as a special statute has overriding effect over the general statute. The Supreme Court held that alternatively even if both the statutes were regarded as special enactments, the later enactment will prevail over the earlier.

7. The submission of the learned counsel for the petitioner is that the powers of the High Court under Sections 391 & 394 are untramelled by the provisions of the RDB Act because section 391 does not make a distinction between classes of creditors. Hence, it is urged that under section 394, the High Court has the power to sanction a compromise or arrangement which has the effect of modifying any contract and once the contract with the secured creditors is so modified, the Debt Recovery Tribunal would necessarily be bound to enforce the terms of the modified arrangement. The submission cannot be accepted for more than one reasons. First and foremost, in the Judgment in Allahabad Bank, the Supreme Court affirmed the view taken by several High Courts which was to the effect that the Companies Act, 1956 is a general enactment which will give way to the special provisions contained in the RDB Act which is enacted to ensure speedy and expeditious adjudication and realisation of debts due to Banks and Financial

Institutions. Secondly, in the exercise of powers conferred by Section 17 of the RDB Act, the Debt Recovery Tribunal have a plenary jurisdiction to enter upon and determine all issues pertaining to adjudication, execution and working out priorities. Thirdly, the process of adjudication into the debt due to IndusInd Bank has already been set in motion by the institution of proceedings under the RDB Act. The sanctioning of the scheme under Sections 391 to 394 will unquestionably dilute the full and plenary powers conferred under the Tribunal under the RDB Act to adjudicate upon the claim of the Bank as presented. Fourthly, the exercise of powers of the Company Court in matters which, fall within the ambit of the jurisdiction of the Debt Recovery Tribunal, would clearly amount to curtailing the jurisdiction of the Tribunal to adjudicate upon the claim of recovery submitted before the Tribunal.

8. The Judgment of the Supreme Court in Allahabad Bank was sought to be distinguished in proceedings which arose before the Kerala High Court on the ground that the High Court was dealing with issues leading to an application filed for stay of a proceeding under section 391(6). In B.P.L. Limited V/s. BNP Paribas & Ors. (Company Appeal No.9 of 2005

decided on 19th July, 2005), a Division Bench of Hon'ble Mr.Justice R. Bhaskaran and Hon'ble Mr.Justice K.P. Balachandran observed thus:-

> " The Supreme Court in Allahabad Bank V. Canara Babk (2000) 4 SCC 406) has held that a Company Court has no jurisdiction over the Debt Recovery Tribunals and Recovery Officers even in cases where winding up petitions are pending or winding up order has been made. This Court has only to follow the same. Though the learned senior counsel for the appellant has argued that in this case we are concerned with an application filed under S.391 (6) of the Companies Act and that question was not under the consideration of the Supreme Court, we do not think that we will be justified in accepting that contention as according to us, the position is not better for the Company when even in winding up proceedings the Company Court has no jurisdiction to stay the proceedings before the Debt Recovery Tribunals.

In a subsequent decision in UCO Bank V/s. BPL Limited & Ors. (Company Appeal No.1 of 2006 decided on 20/12/2006), a Division Bench of the Kerala High Court held that it was not within the jurisdiction of the Company Judge to give positive directions that all legal proceedings that were pending would stand terminated.

9. The scheme of arrangement which has been proposed before the Court would have to be modified with reference to the claim submitted before the Debt Recovery Tribunal in regard to the debt due to IndusInd

Bank Ltd. Clause B of the Scheme contains the following heading:-

"B) Working Capital:-

(Terms of restructuring of assistance for Working capital bankers viz. State Bank of Hyderabad, State Bank of Saurashtra, Bank of India, Karnataka Bank Limited, IndusInd Bank NSD SBICI)

The reference to IndusInd Bank Ltd. shall stand deleted. Consequently, it is clarified that the effect thereof would be that the proceedings pending before the Debt Recovery Tribunal shall not stand affected as a result of the sanction of the scheme of arrangement by the Court.

10. In so far as the other lending institutions are concerned, it has emerged from the proceedings from the Court that the secured creditors representing 90.73% of the total debts have consented to the scheme. Greater Bombay Co-operative Bank Ltd. which represents 3.38 in value of the total outstandings abstained from voting. The report of the Scrutineer, dated 13th June, 2006, has set out that more than 3/4th in value of the secured creditors of the Company present at the meeting voted in favour of the scheme of compromise / arrangement. Even if, due consideration is given to the fact that the claim of IndusInd Bank Ltd. is asserted by the Bank at Rs.625.63 lakhs (as opposed to

Rs.409.53 lakhs as stated in the scheme of compromise / arrangement) that would not affect the question as to whether 3/4th in value of the secured creditors had affirmed the scheme. The Regional Director has appeared before the Court through counsel to state that there is no objection to the scheme. Amongst the secured creditors, those who opted for the scheme are Industrial Bank of India, State Bank of India, State Bank of Hyderabad, Bank of India and Karnataka Bank Ltd. Those lending institutions have agreed to the scheme, having taken a considered decision in their commercial interest. The scheme contemplates various additional conditions. A Monitoring Committee has been constituted by a letter dated 21st December, 2006. Amongst the conditions imposed is a condition to the effect that the Company shall not dispose of any of its fixed assets without the permission of lenders. Sale of Assets will be carried out through an Assets Sale Committee. The restructuring package is subject to annual review and the financial institutions have reserved to themselves the right to review the package and to stipulate additional conditions. The institutions have reserved the right to reset the interest rates after 3 years from the date of approval of the restructuring package and to seek recompense for their sacrifices in the event of a profitable financial

position of the company.

11. In these circumstances, having considered the fact that other lending institutions have taken a commercial decision in their own interests, there is no reason as to why the scheme should not be sanctioned, subject to the modification which has already been adverted to hereinabove, relating to the proceedings initiated before the Debt Recovery Tribunal for the recovery of the Debt due to the IndusInd Bank.

12. In the circumstances, the Company Petition is made absolute in terms of prayer clause (a) subject to the following conditions:-

1. The scheme as proposed shall stand modified by deleting from the scheme, any reference to IndusInd Bank Ltd., which has not accepted the scheme and has instituted proceedings before the Debt Recovery Tribunal for realisation of its dues;

2. In the event that the petitioner seeks to carry out any sale of assets under the scheme which would effect any securities of IndusInd Bank, prior notice of 2 weeks shall be

furnished to the objectors Pegasus Assets Reconstruction Pvt. Ltd. in order to enable the objector to take appropriate steps to safe-guard their interest.

12. The Company petition is disposed of accordingly.

(DR.D.Y.CHANDRACHUD, J.)